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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1569

GLEN MANOR HOME FOR THE JEWISH AGED,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

Petitioner, Glen Manor Home for the Jewish Aged, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on February 22, 1973.

OPINION BELOW

The opinion of the Court of Appeals is unofficially reported in 82 LRRM 2674 and appears herein as Appendix A at pages App. A1-A9.

JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 1973. (Appendix B, *infra*, page App. A10) This Court has jurisdiction under 28 U.S.C. § 1254(1) and 29 U.S.C. § 160(e), (f).

QUESTIONS PRESENTED

(1) Was it unlawful for the National Labor Relations Board to assert jurisdiction over a non-profit nursing home for elderly people of a religious faith?

(2) Did the decision of the NLRB to exercise jurisdiction over Glen Manor Home for the Jewish Aged violate the standards for administrative action imposed by Section 10 of the Administrative Procedure Act (5 U.S.C. § 706)?

STATUTES INVOLVED

This case involves Section 10 of the Administrative Procedure Act, 80 Stat. 393, 5 U.S.C. § 706; and Sections 2(2) (29 U.S.C. § 152(2)); Section 2(7) (29 U.S.C. § 152(7)); Section 9(c)(1) (29 U.S.C. § 159(c)(1)); Section 10(a) (29 U.S.C. § 160(a)); and Section 14(c)(1) (29 U.S.C. § 164(c)(1)) of the National Labor Relations Act, as amended. The relevant statutory provisions are set forth in Appendix C, *infra*, pages App. A11-A14.

STATEMENT

The NLRB Proceedings.

The Glen Manor Home for the Jewish Aged is located in Cincinnati and is a non-profit corporation originally incorporated by the State of Ohio in 1889. No part of the net earnings of the Home issues to the benefit of any private shareholder. It is a residential home for elderly people of various ages. The ages of the occupants range from 58 to 101 years. As medical services are provided, the Board has found it to be a "nursing home." Appendix D, *infra*. At the time of the NLRB hearing, the Home had 78 residents, only one of whom was not a resident of Hamilton County, Ohio, at the time of entry into the Home. This individual came from Dayton, Ohio.

The Home is in effect a Jewish religious congregation. All but two of the residents are Jewish. The Home is affiliated with the Jewish Hospital, the Jewish Federation of Cincinnati, the Jewish Vocational Service, the Jewish Family Service, and the Council of Jewish Women. It has a complete Jewish chapel. It is affiliated with the Hebrew Union College of Cincinnati. A student rabbi provides a full-time religious program. Jewish people contribute heavily to the Home. Various Jewish organizations and individuals contributed all of the capital to build new additions in 1970 and 1971. These contributions were regarded as tax deductible under Internal Revenue Service regulations.

The total gross revenue of the Home in 1970 was $342,039. Part of this revenue was provided by the Community Chest of Cincinnati. Approximately $60,000 revenue came from the Medicaid Program administered by

the State of Ohio. The Home does not participate in the Federal Medicare Program. During 1970, the Home paid $18,000 to the Cincinnati Gas & Electric Company, $24,000 to Cincinnati Bell Telephone, and $20,000 to Shillito's Department Store, all of which are engaged in Interstate Commerce.

Bedridden patients are not admitted to Glen Manor. If a resident requires intensive medical care, he is transferred to Jewish Hospital in Cincinnati, a sectarian non-profit hospital, which has an agreement with Glen Manor to admit any resident sent to the hospital by the Home.

On July 12, 1971, the National Union of Hospital and Nursing Home Employees Union, Local 1099H, Retail, Wholesale and Department Store Union, AFL-CIO filed a a representation petition with the NLRB. The Home disputed the Board's asserted jurisdiction. The Board directed an election which the Union won. The Home refused to bargain and subsequently a bargaining order was issued which is the subject of this proceeding.[1]

The Decision of the Court of Appeals.

The Court of Appeals considered the Home's petition to review and the Board's cross-application for enforcement of its bargaining order and ruled in favor of the NLRB. (Appendix A, *infra*) The Court noted that the Board had not attempted to exercise jurisdiction over non-profit nursing homes until 1968. The Court stated that:

> "* * * the exercise of jurisdiction by the Board is within the administrative discretion of the Board and will not be reversed without demonstration of an abuse of that discretion."

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1. The validity of the Board's union certification is reviewable in such a proceeding. *Leedom* v. *Kyne*, (1958) 358 U.S. 184.

It stated that:

> "The Board's assertion of jurisdiction in violation of its own self-imposed yardstick is not improper."

and that:

> "We cannot hold that the Board's decision to assert jurisdiction over non-profit nursing homes was an abuse of discretion."

The Court said:

> "The Home seeks to have this court impose an analogy between non-profit hospitals, which are statutorily exempt from Board jurisdiction, and non-profit nursing homes. Assuming, without deciding, that such an analogy would have been permissible, we decline to mandate it to the Board. The Board apparently has decided instead that there is a closer analogy between non-profit and proprietary nursing homes."

The Court said that:

> "* * * § 2(2) as enacted does not exclude non-profit employers generally. Only non-profit hospitals are exempted from the class of employers subject to the provisions of the Act and the jurisdiction of the N.L.R.B. 29 U.S.C. § 152(2)."

The Court noted that:

> "Conditions in the health care industry have changed substantially since 1947."

and that:

> "The assertion of jurisdiction by the Board over the non-profit nursing homes cannot be viewed as an abuse of the Board's discretion, in light of the nursing

home industry's impact on the economic life of this country."

On the subject of the Board's $100,000 yardstick applied to nursing homes, the Court said:

"As far as the $100,000 yardstick is concerned, we hold that this was also a permissible standard within the Board's discretion. We reemphasize that the Board's permissible jurisdiction is as broad as the Commerce Clause."

The Court said that:

"The Board's decision that Glen Manor was an industry 'affecting commerce' * * * was not an abuse of discretion.

We hold that the Board's assertion of jurisdiction over non-profit nursing homes generally, and the Glen Manor Home for the Jewish Aged in particular was not improper."

REASONS FOR GRANTING THE WRIT

The Decision Presents Important Questions of Federal Law Which Have Not Been and Should Be Settled by This Court.

A. Congress did not intend for the NLRB to exercise jurisdiction over non-profit nursing homes.

Section 2(2) of the National Labor Relations Act, as amended, excludes from the definition of "employer", and thus excludes from the coverage of the Act, "any corporation or association operating a hospital, if no part of the earnings inures to the benefit of any private shareholder or individual." This provision had its genesis in Section 2(2) of H.R. 3020 introduced in the 80th Congress (Leg. Hist. of the LMRA, 1947, Vol. 1, page 31, at 33-34). The draft section excluded,

> "* * * any corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation."

Section 2(2) of the concurrently introduced Senate Bill, S. 1126 (Leg. Hist., Vol. 1, page 99, at 102) contained no express exclusion for any kind of charitable organization. In the course of the debates in the Senate on S. 1126, Senator Tydings of Maryland, on May 12, 1947, proposed to amend Section 2(2) of the Senate Bill by adding the words "or any corporation or association operating

a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual." (Leg. Hist., Vol. 2, at 1464) In response to this proposal, Senator Taft, Majority Leader and manager of the Bill in the Senate, stated:

> "*The committee considered this amendment, but did not act on it, because it was felt it was unnecessary. The committee felt that hospitals were not engaged in interstate commerce, and that their business should not be so construed.* We rather felt it would open up the question of making other exemptions. That is why the committee did not act upon the amendment as it was proposed." (Leg. Hist., Vol. 2, at 1464; emphasis added)

Senator Tydings then explained his amendment but asserted that non-profit institutions such as hospitals,

> "* * * should not have to come to the National Labor Relations Board, as in the case of ordinary business concerns. They are not in interstate commerce. A hospital is a local institution, quite often kept up by the donations of benevolent persons. I hope the Senate will let the amendment go to conference. Employees of such a hospital should not have to come to the National Labor Relations Board. *A charitable institution is away beyond the scope of labor-management relations in which a profit is involved. No profit is involved in this work.*" (At 1465; emphasis added)

Senator Tydings' amendment was considered by the Conference Committee and adopted by it. The differences between the two bills were resolved. The compromise is detailed in the Conference Report accompanying H.R. 3020 dated June 3, 1947. (Report No. 510, 80th Cong.,

1st Sess.; Leg. Hist., Vol. 1, pages 505, et seq.) The present wording of Section 2(2), *supra,* in which non-profit hospitals were expressly excluded, is set forth in the Report at page 507.

The intention of Congress is clearly set forth in the Conference Report in the following language:

> "The conference agreement follows the provisions of the House bill in the matter of agents of an employer, and follows the Senate amendment in the matter of exclusion of nonprofit corporations and associations operating hospitals. The *other* nonprofit organizations excluded under the House bill are not *specifically* excluded in the conference agreement, *for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act.*" (Leg. Hist., Vol. 1, at 536; emphasis added)

In the first case to reach the Board after enactment of the 1947 amendments, the Board, consistent with the understanding of Congress expressed by Senator Taft and the Conference Report, *supra,* held that "hospitals were not engaged in interstate commerce and that their business should not be so construed", and declined jurisdiction over even proprietary hospitals. In *Flatbush General Hospital,* (1960) 126 NLRB 144, the Board also held that because of the essentially local character of operations and the presence of extensive state regulation "it would not effectuate the policies of the Act to assert jurisdiction over the Employer." (At 145-46)

In 1967, the Board changed its mind and decided to exercise jurisdiction over proprietary hospitals. *Butte*

Medical Properties, (1967) 168 NLRB 266. Concurrently, the Board also assumed jurisdiction over proprietary nursing homes. *University Nursing Home, Inc.,* (1967) 168 NLRB 263. In so doing, the Board made it clear, however, that it had no intention of assuming jurisdiction over non-proprietary nursing homes. The Board said:

> "In the exercise of our discretionary authority, however, we need not assert jurisdiction in all cases involving these facilities. We find that it will effectuate the policies of the Act *to limit our exercise of jurisdiction to those cases involving proprietary nursing homes* and related facilities providing skilled nursing health care, and convalescent services, where the Employer involved receives at least $100,000 in gross revenues per annum." (168 NLRB at 264; emphasis added)

In 1969, the Board was presented with a petition regarding a *non-profit* nursing home. The Board, in an unreported decision, dismissed the petition, stating:

> "The Board * * * has concluded that it will not effectuate the policies of the Act to assert jurisdiction over not-for-profit, or non-proprietary, institutions such as the Employer's and that such institutions, whether they be nursing homes or related facilities, do not fall within the purview of *University Nursing Home, Inc.,* wherein the Board explicitly declined to assert jurisdiction over such non-proprietary institutions." (Quoted in 296 F. Supp., *infra,* at 1102)

A year later, after a District Court ruling which the Board did not appeal[2], the Board reversed itself, and in *Drexel Home, Inc.,* (1970) 182 NLRB 1045, held that it

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2. *AFSCME, Council 19* v. *NLRB,* (1968) 296 F. Supp. 1100.

would exercise jurisdiction over non-profit nursing homes meeting the $100,000 standard adopted for proprietary homes in *University Nursing Home, supra.* The Board stated in *Drexel* that:

> "* * * inasmuch as we have already determined in *University Nursing* that the operations of proprietary health-care facilities substantially affect commerce and that it will effectuate the policies of the Act to assert jurisdiction over such facilities, and because the operations of non-profit extended care facilities are analogous to the operations of such proprietary facilities and also substantially affect commerce in much the same manner, we are constrained to agree with the Court that *the Employer's non-profit status is irrelevant* and that no proper basis exists for declining the assertion of jurisdiction in this proceeding under the provisions of Section 14(c)(1) of the Act. We also find that the $100,000 gross revenue jurisdictional standard established for proprietary facilities in *University Nursing* is applicable to the Employer herein." (182 NLRB at 1047; emphasis added)

In the instant case, the Board concluded that Glen Manor was a non-profit nursing home and assumed jurisdiction on the authority of *Drexel.* (82 LRRM at 2676; App. p. A6)

From the foregoing reference to legislative history, it is apparent that the Board has misconstrued Section 2(2) and has assumed jurisdiction over a type of employer which Congress clearly had intended should be outside the scope and coverage of the Act. In its opinion in *University Nursing Home, supra,* 168 NLRB at 264, the Board said:

> "* * * there are approximately 20,000 public and private, including nonprofit, nursing homes and related facilities in the United States, and that the number of

> persons now being cared for in such facilities add up to 1 to 2 percent of the Nation's population."

It was further stated that:

> "Proprietary nursing homes and related facilities of the kind here under consideration account for over 18,000 of the total 20,000-odd public and private facilities comprising the entire industry in this health care field." (168 NLRB at 264)

It is evident from these figures that the Board's seizure of jurisdiction over non-profit nursing homes involves a substantial number of institutions serving thousands of people. The Board's encroachment into this area which Congress had intended to be protected from the mandatory requirements of the Act, therefore, presents to this Court a question of importance.

Although in Section 2 of the Act, Congress defined a number of the terms employed in the Act, it did not include a definition of the word "hospital" contained in Section 2(2). The *American Heritage Dictionary of the English Language* (1969) defines hospital as "1. An institution providing medical or surgical care and treatment for the sick and the injured" and "3. *Archaic.* A home, often charitable, for old people, the infirm, or foundlings." The courts often have applied a broad definition to the word "hospital" and have held nursing homes to be "hospitals." See, for example, *Reserve Life Insurance Co.* v. *Marr,* (CA 9; 1958) 254 F. 2d 289; *Connors* v. *Mutual Benefit Health & Accident Ass'n.,* (1966) 49 Misc. 2d 776, 268 N.Y. Supp. 2d 154.

It seems evident from the legislative history that Congress intended the non-profit hospital exemption to be broadly construed and to include in its scope non-profit

extended care and nursing home facilities. These are essentially local components of the health care industry performing health care functions comparable to those of general hospitals. When the Board decided to extend its proprietary hospital jurisdiction to include proprietary nursing homes, the Board stressed the similarity of function between hospitals and nursing homes. With respect to proprietary nursing homes, it said:

> "Their primary function, generally speaking, is to *provide skilled convalescent and health care services, supplementing the functions of the short-term proprietary hospitals which offer acute medical and surgical services. The operations of the health care facilities here under consideration correspond in this broad purpose to those of proprietary hospitals in that both are intimately connected with the public health and welfare of the Nation.* The business aspects of the operations of nursing homes are akin to those of proprietary hospitals and affect commerce in substantially the same manner." (*University Nursing Home, supra,* at 264; emphasis added)

Obviously, the comparison is equally valid between non-profit hospitals and non-profit nursing homes. *Thus, a nursing home, such as Glen Manor, which the Board has found provides "nursing care * * * 24 hours per day"*[3] *is, in effect and reality, a form of hospital.* In view of the legislative history quoted above, it is inconceivable that Congress intended that there be any distinction with respect to NLRB jurisdiction between a non-profit hospital and its non-profit nursing home adjunct. If, as the Board and Court have found, Glen Manor Home for the Jewish Aged is a nursing home, it must be regarded as an independent

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3. *Appendix D,* fn. 2.

"hospital" within the meaning of the Act, or as an adjunct to the Jewish Hospital in Cincinnati. As indicated above, Jewish Hospital has an agreement with the Home to accept all emergency and intensive care cases from the Home. The Home, for its part, supplies limited medical care to patients, thus freeing beds in the Hospital for patients requiring more intensive forms of care. If a proprietary nursing home is covered because it is like a proprietary hospital, then it should follow inexorably that a non-profit nursing home is exempt because it either is or is like a non-profit hospital, or is an adjunct thereto.

Also if, as the Sixth Circuit has held, the exercise of jurisdiction over particular classes of employers engaged in commerce is discretionary with the Board, it is clearly either illegal or an abuse of discretion by the Board, particularly in light of the legislative history, to assume and exercise jurisdiction over non-profit extended care and nursing home facilities at a time when the Board is statutorily barred from exercising such jurisdiction over comparable non-profit hospitals.

B. The Board's decision to exercise jurisdiction over Glen Manor Home for the Jewish Aged violates the standards for administrative action imposed by Section 10 of the Administrative Procedure Act. (5 U.S.C. § 706)

The statutory jurisdiction of the Board extends to all representation questions and unfair labor practices "affecting commerce." (*Act, Sections 9(c)(1), 10(a), 29 U.S.C. §§ 159(c)(1), 160(a)*) The term "affecting commerce" is defined in Section 2(7) and has been held to extend the power of the Board to the fullest extent of the Constitutional Congressional commerce power. *Denver Building & Construction Trades Council* v. *NLRB*, (1951)

341 U.S. 675. It has been held, however, that the Board lacks jurisdiction over employers whose impact on commerce is so small as to be *de minimis*. *NLRB* v. *Fainblatt*, (1939) 306 U.S. 361.

Under the Act, the Board is not required to occupy the entire field of its jurisdiction. *Section 14(c)(1)* states that:

> "The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction; *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." (*29 U.S.C. § 164(c)(1)*)

Before the enactment of Section 14(c)(1) in 1958, this Court had already recognized the right of the Board to decline to exercise jurisdiction in particular cases. *Denver Building & Construction Trades Council* v. *NLRB*, *supra*.

For the first fifteen years of the Act, the Board exercised its discretion on an *ad hoc*, case-by-case basis. Then, in 1950, the Board decided that the case-by-case method was inefficient and that:

> "* * * the time has come when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn." (*NLRB Press Release, 5 October 1950*, 26 LRRM 51)

Instead of employing its rule-making powers, the Board announced new jurisdictional standards simultaneously in nine separate decisions. *WBSR Inc.*, (1950) 91 NLRB 630; *Local Transit Lines*, (1950) 91 NLRB 623; *Borden Co.*, (1950) 91 NLRB 628; *Stanislaus Implement and Hardware Co., Ltd.*, (1950) 91 NLRB 618; *Hollow Tree Lumber Co.*, (1950) 91 NLRB 635; *Federal Dairy, Inc.*, (1950) 91 NLRB 638; *Dorn's House of Miracles, Inc.*, (1950) 91 NLRB 632; *Rutledge Paper Products, Inc.*, (1950) 91 NLRB 625; *Westport Moving & Storage Co.*, (1950) 91 NLRB 902. Later announcements of jurisdictional "yardsticks" have also been made in case decisions with two exceptions. The Board employed its rule-making power to set the yardstick for colleges and universities. *Jurisdictional Standards for Colleges and Universities*, 29 CFR Chapter 1, Section 103.1. Also, the Board, through the rule-making procedure, declined jurisdiction over the horse racing and dog racing industries. FR, Vol. 37, No. 138—Tuesday, July 18, 1972, pages 14242-3; 29 CFR Part 103; FR, Vol. 38, No. 73—Tuesday, April 17, 1973, pages 9507, 9537.

In general, the Board's jurisdictional standards are based upon dollar value of inflow or outflow of goods or services in interstate commerce. In the 1950 decisions establishing the basic "yardsticks", the dollar volume limitations were $25,000—direct outflow; $50,000—indirect outflow; $500,000—direct inflow; $1,000,000—indirect inflow. Apparently, these were compilations of the *ad hoc* standards previously applied. The Board gave no detailed explanation as to why one company affected commerce more than another or why the standards were established at the specified levels. The Board simply stated that the choice of the given dollar volumes was made to "effectuate the policies of the Act." See *Stanislaus Implement Co., supra.*

The Board carved out four specific exceptions to its general 1950 dollar volume standards. It would assume jurisdiction without regard to dollar volume over all employers who "affect commerce" and (1) operate as instrumentalities and channels of interstate or foreign commerce (e.g., radio stations), (2) run public utilities and transit systems; (3) operate establishments "as integral parts of a multi-state enterprise" (e.g., chain stores), or (4) "substantially affect national defense." See *NLRB Press Release, 5 October 1950,* 26 LRRM at 51.

In 1954, after a change in Board personnel, the Board announced an increase in the dollar volume yardsticks. *NLRB Press Release, 15 July 1954,* 34 LRRM 75. The Board stated that a survey of 413 cases had convinced the Board that it would be "reasonable and proper" to increase dollar volume requirements and thus further limit the exercise of Board jurisdiction. See *Breeding Transfer Co.,* (1954) 110 NLRB 493. Without disclosing in detail the results of its survey, the Board doubled the required dollar volume for retail and non-retail establishments, increasing them to $50,000—direct outflow; $100,000—indirect outflow; $500,000—direct inflow; $1,000,000—indirect inflow. In *Breeding Transfer Co., supra,* the Board explained that this action had been taken to protect "local" interests and "effectuate the policies of the Act." It stated that the decision was,

> "* * * ultimately one of policy and considered judgment by the Board members, themselves. By their very nature the standards which we now announce cannot be proved scientifically like mathematical problems. In making these modifications, we have given due consideration to all of the criteria spelled out by the Board in 1950, including (1) the problem of bringing the caseload down to manageable size, (2) the

desirability of reducing an extraordinarily large caseload in order that we may give adequate attention to more important cases, (3) the relative importance to the national economy of essentially local enterprises as against those having a truly substantial impact on our economy, and (4) overall budgetary policies and limitations." (110 NLRB at 497)

Special standards were established for the newspaper and broadcasting industries ($500,000 and $200,000 gross volume of business respectively). The cases in which these standards were first applied made no attempt to justify the dollar volume on any comparative or rational basis. Compare *Daily Press, Inc.*, (1954) 110 NLRB 573 with *Hanford Broadcasting Co.*, (1954) 110 NLRB 1257. In *Breeding Transfer Co., supra*, in which these standards were discussed, Member Murdock maintained that the standards covered 20% of all radio broadcasters, 35% of all daily newspapers, and 5% of all weekly newspapers. (110 NLRB at 507) Thus there was not even a pretense of uniformity.

In October 1958, the Board again drastically revised its dollar volume yardsticks, this time reducing them downward so as to increase the covered employers. *Revised NLRB Standards for Asserting Jurisdiction*, (1958) 42 LRRM 96.

The specifics for the new standards were established in a group of cases decided in November 1958. For retail concerns outflow and inflow standards were abandoned in favor of a gross volume of business (hereinafter GVB). The Board explained that this was done because inflow figures were difficult to obtain. *Carolina Supplies and Cement Co.*, (1958) 122 NLRB 88. The GVB yardstick was set at $500,000 for retail concerns. The standard for

non-retail enterprises was to be $50,000 direct or indirect inflow or $50,000 direct or indirect outflow.

The Board explained its 1958 change of course in *Siemons Mailing Service*, (1958) 122 NLRB 81, in the following language:

> "The Board believes that in the present circumstances, its primary function is to extend the national labor policies embodied in the Act as close to the legal limits of its jurisdiction established by Congress as its resources permit. It believes that when, as now, it is simply not possible for it to exercise its jurisdiction in every case, its discretion to decline to assert jurisdiction is more reasonably exercised by the utilization of the revised jurisdictional standards, rather than by following a case-by-case approach. It believes that these standards will reasonably insure that the Board will process all cases involving labor disputes which exert or tend to exert a pronounced impact on commerce." (122 NLRB at 84)

Besides lowering the retail and non-retail standards, the Board made changes in specified industry standards as follows:

(a) Office Buildings—$100,000 gross revenue. $25,000 must be from enterprises meeting other standards. (new)

(b) Instrumentalities of Interstate Commerce—$50,000 revenue from interstate operations (1954—$100,000)

(c) Public Utilities—$250,000 GVB (1954—$3,000,000)

(d) Transit Systems (except taxicabs)—$250,000 GVB (1954—$3,000,000)

(e) Newspapers—$200,000 GVB (1954—$500,000)

(f) Radio, Television, Telephone and Telegraph—$100,000 GVB (1954—$200,000)

(g) National Defense—substantial impact on commerce (1954—$100,000 sale of goods related to national defense) (42 LRRM at 97)

Again, there was no explanation as to why the particular dollar amounts were chosen. The Board's doors were simply opened to some and closed to others by fiat. No percentages of employers or employees were cited. Thus, the apparent inconsistency of reducing the jurisdictional amounts for transit systems by 92% while reducing broadcasting by only 50% was unexplained.

The revisions in jurisdictional standards made in 1958 resulted in the enactment by Congress in that year of *Section 14*(c)(*1*) of the Act quoted, *supra*.

Subsequent to 1958, the Board proceeded to adopt specific standards different from the general standards, which were to be applicable to certain specified industries:

(a) Apartment projects—$500,000 GVB. *Parkview Gardens*, (1967) 166 NLRB 697.

(b) Private, non-profit colleges and universities—$1,000,000 gross revenue. *Cornell University*, (1970) 183 NLRB No. 41, 74 LRRM 1269, 29 CFR Chapter 1, Section 103.1.

(c) Country Clubs—$500,000 GVB. *Walnut Hills Country Club*, (1963) 145 NLRB 81.

(d) Proprietary Hospitals—$250,000 GVB. *Butte Medical Properties*, (1967) 168 NLRB 266.

(e) Proprietary Nursing Homes—$100,000 GVB. *University Nursing Home*, (1967) 168 NLRB 263.

(f) Non-Profit Nursing Homes—$100,000 GVB. *Drexel Home,* (1970) 182 NLRB 1045.

(g) Residential Hotels—$500,000 GVB. *Penn-Keystone Realty Corp.,* (1971) 191 NLRB No. 105, 77 LRRM 1600.

In these decisions, the Board made no rational or consistent explanation of the minimum figures chosen for the particular industries. With respect to apartment hotels, the Board said, in *Parkview Gardens, supra*:

> "Because of an increasing incidence of cases involving this industry, the Board has now decided to establish an appropriate jurisdictional yardstick for the residential apartment industry. This industry is one of substantial size, it is a highly financed segment of our economy, and its operations exert a substantial impact on commerce." (166 NLRB at 697-8)

In setting the $500,000 GVB yardstick, the Board said:

> "In making this determination, we have been guided by our experience over retail concerns and over concerns in the hotel and motel industry where we have applied the $500,000 gross revenue standard. We are persuaded that this standard will enable the Board to exercise jurisdiction over that part of the industry which exerts a substantial impact on commerce, without unduly burdening the Board's processes by involving it in a multitude of cases whose total economic significance is slight." (166 NLRB at 698)

The Board later extended this reasoning to residential hotels. *Penn-Keystone Realty Corp., supra.*

After the Board, in 1967, decided to exercise jurisdiction over proprietary hospitals (*Butte Medical Properties, supra*) because "the considerations bearing on our juris-

dictional determination in this industry have markedly changed since the *Flatbush* decision" (168 NLRB at 268), the Board announced that the appropriate yardstick for proprietary hospitals should be $250,000. It said:

> "The available evidence indicates that this standard will require the assertion of jurisdiction over that part of the class of employers involved herein which exerts a significant impact on commerce, and does so without burdening the Board's processes by involving the Board in the remainder of that class where the impact is relatively slight. The $250,000 standard imposed will accomplish this result while at the same time ensuring effective regulation of labor relations in this area." (168 NLRB at 268)

On the day the Board reversed itself on proprietary hospitals, it also assumed jurisdiction over proprietary nursing homes doing at least $100,000 GVB per year. *University Nursing Home, Inc., supra.* Its reasoning in support of its dollar volume yardstick was as follows:

> "We find that it will effectuate the policies of the Act to limit our exercise of jurisdiction to those cases involving proprietary nursing homes and related facilities providing skilled nursing health care, and convalescent services, where the Employer involved receives at least $100,000 in gross revenues per annum. On the basis of such information as is available to us and as has been brought to our attention in the briefs of the parties, we are satisfied that application of this standard will provide effective coverage over a significant portion of the nursing home industry to a substantially like extent that the $250,000 gross revenue standard provides coverage over a significant portion of the proprietary hospital industry. Were we to set a $250,000 gross revenue standard for the

nursing home industry, it would confine our asserted jurisdiction to a segment of that industry so small as to have little constructive impact on the labor relations of the industry as a whole, thereby failing to effectuate our policy determination to extend the benefits and protections of the Act to employers, employees, and labor organizations in this industry to the fullest extent possible without unduly burdening the Board's processes, its workload or its budgetary limitations." (168 NLRB at 264)

The Board attempted to support this reasoning by reference to a study of the nursing home industry prepared by HEW.

When, in 1970, the Board decided to assume jurisdiction over non-profit nursing homes, it likewise set the jurisdictional yardstick at $100,000. *Drexel Home, Inc.*, 182 NLRB at 1047.

From the foregoing, it will be seen that the Board has fashioned jurisdictional yardsticks ranging all the way from $50,000 to $3,000,000. The striking thing about this wide spectrum of figures is that there seems to be no objective standard or uniform yardstick used by the Board in determining the size of the jurisdictional minimum applied to a particular class of employers. In 1954, in *Breeding Transfer Co., supra*, the Board identified the factors determining the size of the yardstick as:

"(1) the problem of bringing the caseload of the Board down to manageable size, (2) the desirability of reducing an extraordinarily large caseload in order that we may give adequate attention to more important cases, (3) the relative importance to the national economy of essentially local enterprises as against those having a truly substantial impact on our

> economy, and (4) overall budgetary policies and limitations." (110 NLRB at 497)

Obviously, each one of the first three of these four enumerated factors would dictate that jurisdiction *not* be extended to include non-profit nursing homes.

Four years later, the Board, after an apparent increase in its budget, announced a radical change in its policy. In *Siemons Mailing Service, supra,* it reduced its minimums drastically and stated that:

> "* * * in the present circumstances, [the Board's] primary function is to extend the national labor policies embodied in the Act as close to the legal limits of its jurisdiction established by Congress as its resources permit." (122 NLRB at 84; emphasis added)

The Board made no effort to explain, however, why its resources would permit it to take radio and television cases involving $100,000 GVB but only newspaper cases involving $200,000 GVB, or instrumentalities of commerce with $50,000 GVB but only office buildings with GVB of $100,000.

In *University Nursing Home, Inc., supra,* decided in 1967, the Board was still purporting to fashion yardsticks through reference to its own budgetary limitations. In attempting to justify the extension of jurisdiction to proprietary nursing homes, the Board stated that this would,

> "* * * effectuate our policy determination to extend the benefits and protections of the Act to employers, employees, and labor organizations in this industry to the fullest extent possible without unduly burdening the Board's processes, its workload, or its budgetary limitations." (168 NLRB at 264)

Again, there was no attempt to demonstrate that the budget would accommodate a $100,000 yardstick in this industry but not a $50,000 or a $75,000 yardstick. The figure of $100,000 was obviously purely subjective—purely arbitrary and capricious.

The arbitrary character of the Board's selection of jurisdictional minimums is strikingly demonstrated in the Board's announcement in 1970 that it would thereafter assert jurisdiction over private, non-profit colleges and universities having a gross annual revenue of $1,000,000. (186 NLRB No. 153, 75 LRRM 1442) After agonizing over the $1,000,000 gross revenue figure, the Board explained that data which had been submitted by the parties indicated that such a standard "would bring some 80 percent of all private colleges and universities and approximately 95 percent of all full- and part-time nonprofessional personnel within the reach of the Act." The Board then acknowledged that:

> "* * * available data revealed that the $250,000 gross revenue standard established for the hospital industry extended the Board's jurisdiction to approximately 76 percent of the institutions in that field. In adopting a $500,000 annual gross revenue standard for the hotel industry, the Board observed that only 3.5 percent of the employers, but over 60 percent of the hotel employees, would be covered. The same gross revenue standard applied to the retail industry encompassed 6.5 percent of the retail store employees." (75 LRRM at 1443)

The above quotation is revealing in several respects. It confirms that in adopting its yardsticks, the Board does not attempt to apply any uniform rule as to the percentage of the employers or employees to be covered in the affected industry. Moreover, the Board really pays no at-

tention at all to its budgetary limitations in determining the size of the yardstick. The Board indicates that its principal interest is in bringing "within the Board's jurisdiction *those labor disputes in the industry which exert or tend to exert, a pronounced impact on commerce.*" (75 LRRM at 1443) It seems obvious that if such a yardstick had been applied by the Board in good faith to the non-profit nursing home industry, those homes would have been treated exactly like the smaller colleges were treated in the formulation of the above rule—they would have been excluded from Board jurisdiction. Of the 20,000 nursing homes in the United States, only 2,000 are non-profit. *University Nursing Home,* 168 NLRB at 264. This group of homes, like the small colleges, could hardly exert a "pronounced impact on commerce."

Perhaps the most dramatic illustration of the Board's arbitrary and inconsistent jurisdictional rulings is its recent decision to decline jurisdiction over the horse racing and dog racing industries. (Cited, *supra*) The Board did not set a jurisdictional minimum for this giant industry for profit. Instead, it totally declined to assert jurisdiction. The reasons given were that:

> "* * * the operations of these industries continue to be peculiarly related to, and regulated by, local governments and, further, that our exercise of jurisdiction would not substantially contribute to stability in labor relations. We are also not unmindful of the fact that relatively few labor disputes have occurred in these industries in recent years, thus reaffirming the Board's earlier assessment that the impact of labor disputes in these industries is insubstantial and does not warrant the Board's exercise of jurisdiction." (*FR, Vol. 38, No. 73,* Tuesday, April 17, 1973, at 9537)

The standards applied by the Board to reject horse racing and dog racing are not the standards used in asserting jurisdiction over non-profit nursing homes. If such standards were applied to nursing homes, consistency would require the rejection of jurisdiction over such institutions. Like race tracks, nursing homes are "regulated by local government." The Board has never made any finding or contention that "labor disputes have occurred" in the nursing home industry in recent years of sufficient magnitude to require Board jurisdiction, and there has been no finding that the "impact of labor disputes" in non-profit nursing homes is substantial. It is astonishing to hold, as the Board has done, that the giant pari-mutuel horse racing and dog racing industries do not have sufficient impact on commerce to warrant the assertion of Board jurisdiction, but that a small non-profit extended care facility, such as Glen Manor, must be regulated and subjected to the compulsory provisions of the Act.

If it is not necessary to regulate smaller colleges, no basis is shown for the regulation of smaller nursing homes. If it is not necessary to regulate apartment projects or residential hotels for profit with a GVB of less than $500,000 why is it necessary to regulate non-profit nursing homes with a GVB of only $100,000? If it is not necessary to regulate the horse racing and dog racing industries because they are regulated by local governments and have had relatively few labor disputes, there can be no justification at all for regulating small non-profit nursing homes licensed by local governments with no showing of any substantial impact of labor disputes. The choice of one yardstick for one group and a radically different yardstick for another group, and the absence of any single or uniformly applied standard for determining the yardsticks, is clearly subjective rather than objective, and both arbitrary and capricious. *Such methodology is truly an "abuse*

of discretion" on the part of the National Labor Relations Board, in violation of Section 10 of the Administrative Procedure Act, supra. (Appendix C, pp. A11-A12)

When arbitrary action on the part of the Board has been properly brought to the attention of other courts, they have not hesitated to set aside such Board action. In *Pedersen* v. *NLRB*, (CA 2; 1955) 234 F. 2d 417, for example, the court ordered the Board to assert jurisdiction in a particular case, stating:

> "It is of course true that the Board has broad discretionary power to decline to consider cases within its statutory jurisdiction where it finds that such a course will best effectuate the policies of the Act. See e.g., N.L.R.B. v. Denver Building & Construction Trades Council, 1951, 341 U.S. 675, 684, 71 S.Ct. 943, 95 L.Ed. 1284. But the Board itself has recognized that its discretion is not unlimited. Breeding Transfer Company, 110 N.L.R.B. 493, 495 (1954). Where the Board acts arbitrarily or capriciously or where its action conflicts with a clear purpose of the statute, it has exceeded its authority. Thus the Board's retroactive assertion of jurisdiction over conduct previously considered to be outside its jurisdictional criteria has been held improper." (234 F. 2d at 419)

Also, in *NLRB* v. *Guy F. Atkinson Co.*, (CA 9; 1952) 195 F. 2d 141, 151, the court stated:

> "We cannot but conclude that so much of the order as requires Hewes' reinstatement was agency action which we are directed by § 10 of the Administrative Procedure Act to set aside as arbitrary, capricious, and an abuse of discretion."

In an enforcement proceeding such as this, the burden of demonstrating jurisdiction was upon the Board. *NLRB*

v. *Clark* (*Ashville-Whitney Nursing Home*), (CA 5; 1972) 468 F. 2d 459, 467. The Board has failed to establish that Glen Manor is not a non-profit "hospital" within the meaning of the Act, or the reasonableness of its $100,000 yardstick for the exercise of jurisdiction over non-profit extended care and nursing home facilities. Its wholly unrelated and *ad hoc* procedures for ascertaining and applying jurisdictional minima are discriminatory, arbitrary, capricious and an abuse of discretion. Furthermore, the Board has failed to prove that labor disputes in non-profit nursing homes have any substantial or pronounced impact on commerce. It is evident that the Board will continue to apply these wholly unfair and improper procedures and will continue to exercise its jurisdiction capriciously unless such procedures are held to be unlawful and are set aside by this Court as required under the express provisions of Section 10 of the Administrative Procedure Act.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

Of Counsel:
J. ALAN LIPS, ESQ.

APPENDIX

APPENDIX A

Glen Manor Home v. NLRB

U. S. Court of Appeals,
Sixth Circuit (Cincinnati)

GLEN MANOR HOME FOR THE JEWISH AGED v. NATIONAL LABOR RELATIONS BOARD, No. 72-1537, February 22, 1973

Labor Management Relations Act

—Jurisdiction of NLRB—Non-profit nursing home—Maintenance of challenge 43.605

Employer that operates non-profit nursing home and that has brought proceeding to review NLRB order requiring it to bargain with newly certified union may challenge Board's assertion of jurisdiction over it, even though exact nature of employer's jurisdictional objection in court may differ from specific objection before Board, since employer maintained continuing objection to jurisdiction in representation proceeding and was barred from making such objection in unfair-labor-practice proceeding in absence of newly discovered evidence.

—Jurisdiction of NLRB—Non-profit nursing home 43.605

NLRB did not abuse its discretion when, pursuant to its decision in Drexel Home (74 LRRM 1232), it asserted jurisdiction over employer operating non-profit nursing home. (1) Board is not required to accept analogy between non-profit hospitals, which are exempt from Board jurisdiction under Section 2(2) of LMRA, and non-profit nursing homes; (2) Board's jurisdictional standard of

$100,000 for non-profit nursing homes is permissible; (3) employer's contention that it is not nursing home within Board's Drexel rule is issue of fact, and Board's determination is entitled to great weight; (4) Board did not abuse its discretion in finding that employer is in industry "affecting commerce."

Petition to review, and cross-petition to enforce, an order of the NLRB (80 LRRM 1434, 196 NLRB No. 171). Enforcement granted.

J. Mack Swigert (Taft, Stettinius & Hollister, with him on brief), Cincinnati, Ohio, for petitioner.

Frank Vogl (Peter G. Nash, General Counsel, Patrick Hardin, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Elliott Moore, Deputy Assistant General Counsel, with him on brief), for respondent.

Before PHILLIPS, Chief Judge, PECK, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

Full Text of Opinion

PHILLIPS, Chief Judge:—The Glen Manor Home for the Jewish Aged brings this petition to review and set aside a National Labor Relations Board order and decision finding it in violation of §§ 8(a)(1) and 8(a)(5) of the National Labor Relations Act. 196 NLRB No. 171, 80 LRRM 1434.

[Facts of Case]

The Home is a non-profit institution located in Cincinnati and is licensed by the city as a nursing home and as a rest home. It maintains constant health services for its approximately 80 residents. A physician is on call at

all times and is present at the Home three times weekly. Constant nursing care is administered by a staff of four registered nurses, three graduate licensed practical nurses (GLPN's) and ten nurses' aides. When residents become ill, the Home attempts to care for them as long as possible, but when they reach the critical stage they are discharged to a hospital or a private nursing home. The Home has no major medical facilities. All services necessary for residents are provided, including food preparation, laundry services, housekeeping and maintenance. Average length of residence at the Home is three and one-half years.

In 1970 the gross revenue of the Home was $342,039. Approximately $60,000 of this came from the State-administered federal-state Medicaid program. During 1970, the Home paid $18,000 to the Cincinnati Gas & Electric Company, $2,400 to Cincinnati Bell Telephone and $20,000 to Shillito's department store, all of which are engaged in interstate commerce.

On July 12, 1971, the National Union of Hospital and Nursing Home Employees, Local 1099 H. Retail, Wholesale & Department Store Union, AFL-CIO, filed a representation petition and requested an election be held among the Home's service and maintenance employees. On September 2, the Regional Director issued his decision and direction of election after finding that the Home was subject to Board jurisdiction as a nursing home under the standards of University Nursing Home, Inc., 168 NLRB 263, 66 LRRM 1263 (1967). This decision included two of the GLPN's in the bargaining unit and excluded the third. The Board denied the Home's petition for a review, determining that the two GLPN's included in the unit should be permitted to vote in the representation election subject to the challenge procedure. It should be noted that through-

out the representation proceedings the Home disputed the Board's asserted jurisdiction over it.

[Election Conducted]

The representation election was conducted on October 1, 1971, with the Union winning, 19-15. The Union was certified as the unit's collective bargaining agent, after which the Home refused to bargain with it. The Union thereupon filed a complaint against the Home alleging violations of §§ 8(a)(1) and 8(a)(5). The defense of the Home in the unfair labor practice proceedings was the alleged impropriety of the bargaining unit. The Board, on May 22, 1972, found that the refusal to bargain was an unfair labor practice and violated §§ 8(a)(1) and 8(a)(5) of the Act.

The Board held that the improper unit claim of the Home concerning the GLPN's was not a valid defense to the unfair labor practice charge because there was no doubt as to the majority status of the union. The Board suggested bargaining over the unit placement of the GLPN's or, failing at that, a petition for unit clarification.

The Home now seeks review of the order and decision of the Board on two grounds: 1) the Board improperly asserted jurisdiction over it, and 2) the unit outlined by the Board in the representational proceedings was improper. We examine the issues in order.

1) Jurisdiction

It is well established that Congress, in passing the National Labor Act, gave and intended to give the Board the fullest permissible jurisdiction under the Commerce Clause of the Constitution. N.L.R.B. v. Reliance Fuel Oil Corp., 371 U.S. 224, 226, 52 LRRM 2046 (1963); Polish Na-

tional Alliance v. N.L.R.B., 322 U.S. 643, 647, 14 LRRM 700 (1944). The statutory jurisdiction of the Board extends to all representation questions and unfair labor practices "affecting commerce." 29 U.S.C. §§ 159(c)(1), 160(a).

Because of several factors, including limited resources and manpower, the Board for the first fifteen years of its existence determined on an ad hoc case-by-case method whether to assume jurisdiction in a particular case. This was replaced in 1950 with the pronouncement of a series of "yardsticks" to determine whether the Board would assume jurisdiction in a specific type of case. These standards, issued in a series of 1950 decisions by the Board, were essentially dollar volumes. The Board held that if these dollar volume minimums of the value of inflow or outflow were exceeded in a particular case then it would take jurisdiction. In other cases it would decline to act. Different yardsticks were promulgated for different industries. The yardsticks were raised in 1954 and then lowered in 1958. See Siemons Mailing Service, 122 NLRB 81, 43 LRRM 1056 (1958). In 1959, Congress validated this Board practice, extending over a span of 20 years, of declining jurisdiction in certain cases, by the enactment of § 14(c)(1) of the Act. 29 U.S.C. § 164(c)(1). This amendment authorizes the Board to decline jurisdiction by "rule of decision or by published rules."

[Board Decisions]

There is no statutory jurisdiction over non-profit hospitals. 29 U.S.C. § 152(2). The Board originally exercised no jurisdiction over proprietary hospitals either. Flatbush General Hospital, 126 NLRB 144, 45 LRRM 1286 (1960), but asserted jurisdiction over them in 1967. Butte Medical Properties, 168 NLRB 266, 66 LRRM 1259 (1967).

On the same day, the Board asserted jurisdiction for the first time over proprietary nursing homes, University Nursing Home, 168 NLRB 263, 66 LRRM 1263 (1967), and announced a gross volume of business yardstick of $100,000. The Board, in that decision, found that there were over 20,000 public and private nursing homes in the country at that time, caring for from one to two per cent of the nation's population. By 1965, the annual gross national expenditure for nursing home care was $1.2 billion, up 754 per cent from the 1950 expenditure of $142 million.

The Board did not exercise jurisdiction over non-profit nursing homes until, in 1968, a District Court held that the Board could not constitutionally assert jurisdiction over proprietary nursing homes while renouncing jurisdiction over non-profit nursing homes. Council 19, AFSCME v. NLRB, 296 F.Supp. 1100, 69 LRRM 2275 (N.D. Ill.). That court held that once the Board exerted jurisdiction over a class of employers (nursing homes), as it had in University Nursing Home, supra, it could not renounce jurisdiction over an entire category of employers within that class (non-profit nursing homes). Soon afterwards, in the same case, the Board asserted jurisdiction over non-profit nursing homes. Drexel Home, Inc., 182 NLRB 1045, 74 LRRM 1232 (1970). The Board found, in Drexel, that the non-profit nursing home exercises the same kind of impact on interstate commerce as a proprietary nursing home. The Board adopted the same $100,000 yardstick for non-profit nursing homes as it had previously adopted for proprietary homes.

The Home here makes three separate attacks on the jurisdiction of the Board. First, it maintains that Drexel, under whose authority the Board assumed jurisdiction of this case, is an impermissible assertion of jurisdiction by the Board; second, it asserts that the $100,000 yardstick

is arbitrary and capricious; and third, it claims that it is not a nursing home within the meaning of the Drexel rule.

[Claims Allowed]

The Board's contention that the Home should be barred from making its jurisdictional claims on appeal is illfounded. The Home maintained a continuing jurisdictional objection in the representation proceedings and was barred from making these claims in the unfair labor practice proceedings before the Board in the absence of newly found evidence. N.L.R.B. Rule No. 102.67(f); Howard Johnson Co., 164 NLRB 801, 65 LRRM 1245 (1967); Cf. May Dept. Stores Co. v. N.L.R.B., 326 U.S. 376, 379, 17 LRRM 643 (1945). It appears that the exact nature of the jurisdictional objection may be different in this Court from the specific objection before the Board. This is not, however, controlling.

This court has held that the exercise of jurisdiction by the Board is within the administrative discretion of the Board and will not be reversed without demonstration of an abuse of that discretion. Lucas County Farm Bureau Cooperative Ass'n v. N.L.R.B., 289 F.2d 844, 845-46, 48 LRRM 2130 (6th Cir.), cert. denied, 368 U.S. 823, 48 LRRM 3111 (1961); N.L.R.B. v. Guernsey-Muskingum Electric Co-Op, 285 F.2d 8, 11, 47 LRRM 2260 (6th Cir. 1960). We have held further that the Board's assertion of jurisdiction in violation of its own self-imposed yardstick is not improper. N.L.R.B. v. West Side Carpet Cleaning Co., 329 F.2d 758, 760, 55 LRRM 2809 (6th Cir. 1964).

We cannot hold that the Board's decision to assert jurisdiction over non-profit nursing homes was an abuse of discretion. The Home seeks to have this court impose an analogy between non-profit hospitals, which are statu-

torily exempt from Board jurisdiction, and non-profit nursing homes. Assuming, without deciding, that such an analogy would have been permissible, we decline to mandate it to the Board. The Board apparently has decided instead that there is a closer analogy between non-profit and proprietary nursing homes.

The Home has delineated ample evidence in the legislative history of the Labor Management Relations Act that the Senate committee did not originally exclude hospitals from N.L.R.B. jurisdiction in the preliminary draft of what became § 2(2) of the Act because, in the words of Senator Taft, "the Committee felt that hospitals were not engaged in interstate commerce and . . . their business should not be so construed." 2 Legislative History of the Labor Management Relations Act (1947) at 1464. While this may well be true, § 2(2) as enacted does not exclude non-profit employers generally. Only non-profit hospitals are exempted from the class of employers subject to the provisions of the Act and the jurisdiction of the N.L.R.B. 29 U.S.C. § 152(2).

[Changed Conditions]

Conditions in the health care industry have changed substantially since 1947. The Board, in the Universal Nursing Home decision in 1967, noted that there was a 754 per cent increase in nursing home care expenditures between 1950 and 1965. 168 NLRB at 264, 66 LRRM 1263. This data now is over seven years old. The assertion of jurisdiction by the Board over the non-profit nursing homes cannot be viewed as an abuse of the Board's discretion in light of the nursing home industry's impact on the economic life of this country.

As far as the $100,000 yardstick is concerned, we hold that this was also a permissible standard within the

Board's discretion. We reemphasize that the Board's permissible jurisdiction is as broad as the Commerce Clause.

The Home seeks to have this court hold that it really is not a nursing home within the Drexel rule. This same contention was made by the home for the aged in Drexel itself. This is a fact determination within the jurisdiction of the Board and its determination is entitled to great weight. We find no abuse of discretion. The Board's decision that Glen Manor was an industry "affecting commerce" similarly was not an abuse of discretion.

We hold that the Board's assertion of jurisdiction over nonprofit nursing homes generally and the Glen Manor Home for the Jewish Aged in particular was not improper.

2) Unit Determination

The Home has claimed, before the Board and this court, that there was an improper unit determination made by the Board in including two of the GLPN's in the bargaining unit. The Home claims that these two employees are supervisors. A search of the record reveals that the Regional Director in his decision in the representation case did hold to this effect. The Board, however, in its actions in both the representation case and the unfair labor practice proceeding, has not ruled on the propriety of the inclusion of these two GLPN's within the unit. Instead it has suggested arbitration or bargaining or a petition for unit clarification, which is available to either party. 29 CFR § 102.60 (b). It should be noted that their inclusion or exclusion will not affect the Union's majority status within the unit because of the 19-15 vote in the representation election. We, therefore, make no ruling on their status.

We deny the petition of the Home and grant the Board's cross application to enforce its order.

APPENDIX B

No. 72-1537

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GLEN MANOR HOME FOR THE JEWISH AGED,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Order

(Filed February 22, 1973)

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

On petition to review and cross-petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition to review is denied and the order of the National Labor Relations Board is enforced.

It is further ordered that Respondent recover from Petitioner the costs on appeal as itemized below.

Entered by order of the Court.

/s/ James A. Higgins
Clerk

APPENDIX C

Administrative Procedure Act

Section 10(e)

5 U.S.C. §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute or

(F) unwarranted by the acts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Statutes—National Labor Relations Act, As Amended

Section 2(2)

29 U.S.C. §152(2)

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Section 2(7)

29 U.S.C. §152(7)

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Section 9(c)(1)

29 U.S.C. §159(c)(1)

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals, or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

The Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Section 10(a)

29 U.S.C. §160(a)

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Section 14(c)(1)

29 U.S.C. §164(c)(1)

(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

APPENDIX D

Decision and Direction of Election Case No. 9-RC-9159

Decision and Direction of Election

(Filed September 2, 1971)

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purpose of the Act to assert jurisdiction herein.[2]

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2. The Employer herein is an Ohio corporation, located in Cincinnati, Ohio where it is engaged in the operation of a facility licensed by the City of Cincinnati both as a nursing home and as a rest home, herein referred to as the Home. The Home has accommodations for 82 individuals, and at the time of the hearing there were 78 full-time residents. All residents must be ambulatory at the time of admission to the Home.

The Home maintains constant health services for the residents. A physician is present three mornings per week for four hours each, and is on call 24 hours per day. A dentist is present once a week for at least one hour. The nursing staff consists of approximately 17 employees, including 3 registered nurses or RN's, 4 graduate licensed practical nurses or LPN's, and 10 nurses' aides. Nursing care is provided 24 hours per day, 7 days per week to the residents of the Home. In order to qualify for a license from the City of Cincinnati as a nursing home, the Home

(Continued on following page)

2. The labor organization involved claim(s) to represent certain employees of the Employer.[3]

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

Footnote continued—

is required to provide skilled nursing care. The regular practice of the Home is to administer light to medium nursing services. When residents become ill, the Home attempts to care for them as long as possible with the staff they employ and the facilities available. When residents reach a critical stage, they are discharged to either a hospital or a private nursing home.

The Employer had gross revenues in the past 12 months, which is a representative period, valued in excess of $342,000, of which $60,000 was obtained from Medicaid, a joint program administered by the State of Ohio on behalf of the Federal Government. The Employer, during the same period, paid $18,000 to the Cincinnati Gas and Electric Company, and $2,400 to Cincinnati Bell, both of whom are engaged in interstate commerce. During fiscal 1970, the Employer also purchased $20,000 in goods from Shillito's Department Store in Cincinnati, which is owned by Federated Department Stores and is also engaged in commerce within the meaning of the Act.

In view of the above I reject the Employer's contention advanced in its brief that the Board should decline to exercise jurisdiction in this case on the ground the Home involved here is a residential facility as distinguished from a nursing home. The Employer contends that the proper jurisdictional standards to be exercised herein are those set forth in *Parkview Gardens*, 166 NLRB No. 80, which establishes standards for a residential hotel or apartment building. This view is based on the fact, argued by the Employer, that the individuals herein are not "patients" but residents. The above facts relative to the nursing care provided on an around-the-clock basis, seven days per week indicate that the facility is something more than a residence. Moreover, as noted above, the Employer operates under a license as both a nursing home and a rest home.

Upon the record as a whole, I find the Employer is a nursing home, that it is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein since it satisfies the Board's standards for nursing homes. *University Nursing Homes, Inc.*, 168 NLRB 263.

3. While making an appearance at the hearing, Service, Hospital, Nursing Home and Public Employees Union, Local 47, Service Employees International Union, AFL-CIO made no motion to intervene, and, as such, is not a party to these proceedings.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[4]

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4. The Employer operates on a multi-shift basis. There are approximately 44 individuals in the unit found appropriate herein. As noted above, there is constant nursing service available for residents. The Employer also furnishes all services necessary for residential occupants such as food preparation, laundry services, housepeeking services and maintenance.

The Graduate Licensed Practical Nurses (GLPN'S): The Employer contends, contrary to the Petitioner, that the GLPN's should be excluded from the unit found appropriate herein on the ground that they are professional employees and/or supervisors within the meaning of Section 2(11) of the Act.

The record discloses that Irene E. Smith is the head of nursing services and under her are three (registered nurses) RN's, three GLPN's and approximately eleven nurses' aides, orderlies, and ward clerks. The GLPN's currently are Bertha Taylor, Frances Olshewski and Johnnie Black. All are graduates of a one year program beyond high school and are licensed on a yearly basis by the State of Ohio. The nursing staff varies on each shift. The first shift, 7:00 a.m. to 3:30 p.m. consists of one RN, one GLPN, one orderly, and five or six nurses' aides. The second shift, 3:30 p.m. to 11:30 p.m., consists of one RN, one GLPN, one orderly and three nurses' aides. The third shift, 11:00 p.m. to 7:30 a.m. consists of one GLPN and two nurses' aides.

Irene Smith, the head of nursing services, is the registered nurse on duty during the day. Her hours are from 8:00 a.m. to 5:30 p.m. While there, she supervises the activities of the nursing staff. There is a second RN on the second shift who is considered to be the charge nurse and who supervises the activities of the nursing staff on that shift. The third shift is headed by a GLPN who is considered the charge nurse.

GLPN Black acts as charge nurse for 40 hours per week on the third shift. During that shift, two nurses' aides work with her. During August GLPN Taylor acted as charge nurse for two shifts during the week of August 13, 1971. GLPN Olshewski acted as charge nurse for 16 hours or two working days during the week of April 6. When either a GLPN or an RN is designated as charge nurse, it is their responsibility to see that all required work is completed during that shift. The charge nurse must supervise the activities of the nurses' aides, ward clerks, and orderlies. The charge nurse is responsible to see that the overall nursing service is adequately carried out. While acting as charge nurse, the RN or GLPN does not bathe or feed patient but is primarily responsible for carrying out the doctor's orders, i.e., changing dressings when required, checking medical charts for medication or indicated treatments, and reporting medical symptoms.

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All employees of the Employer employed at its facility in Cincinnati, Ohio, who perform service and maintenance work relating to patient service, including graduate licensed practical nurses, nurses' aids, orderlies, housekeeping employees, maids, janitors, laundry employees, grounds maintenance employees, and kitchen employees, but excluding all office clerical employees, registered nurses, beauticians, dieticians, doctors, and all other professional employees, activities personnel, craft shop personnel and all guards and supervisors as defined in the Act.

Footnote continued—

When an RN is present, the GLPN assumes charge of medications. The GLPN checks cards located at each nursing station indicating the medication for each person requiring it. A key to the narcotics cabinet is kept by Smith and a second key is passed from shift-to-shift to the GLPN who is in charge of administering medication.

The Employer contends that the GLPN's, while acting as charge nurses, have the authority to discipline employees and report infractions of the rules. GLPN Black, as disclosed by the record did, in fact, discipline an employee during the course of the night shift. Smith, when contacted about the matter by Black, declined to intervene, saying that Black was in charge of the shift.

The record discloses that during the course of a week there are RN's, GLPN's, and nurses' aides all acting in the capacity of charge nurses, the latter two on a limited basis. At the time of the hearing, there were two days per week when a nurses' aide was in charge during the third shift. The Employer stated the reason for this was that it was unable to attain additional full-time GLPN's. During emergencies, the record shows that nurses' aides perform most of the duties performed by GLPN's, including distribution of medication under supervision, acting as charge nurse, reporting medical symptoms of patients, and seeing that required medical care is administered.

All employees, up to RN's, are paid an hourly wage and punch a time clock. The RN's receive approximately $1.00 more than the GLPN's who receive approximately $1.50 more than the nurses' aides and orderlies. Vacation benefits received by the RN's and GLPN's include a provision for three weeks vacation after three years' service, while nurses' aides and other employees in nonsupervisory positions must be employed for 10 years before qualifying for three weeks' vacation.

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Direction of Election

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic

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Footnote continued—

I find, on the basis of the record before me, that GLPN *Johnnie Black* is a supervisor within the meaning of the Act, and I shall exclude her from the unit herein found appropriate and declare her ineligible to vote in the election directed herein. *University Nursing Home*, 168 NLRB 263, 265. Notwithstanding my determination as to *Black*, I am unable to find that the duties of GLPN's *Frances Olshewski* and *Bertha Taylor* rise to the level of supervisory authority. While it is true that they act as charge nurses, it is equally true that this is done on an irregular and intermittent basis. Such isolated supervisory substitution is not a sufficient basis for a supervisory finding. *Gordon Mills, Inc.*, 145 NLRB 771. Moreover, individuals exercising only sporadic or irregular supervisory functions do not meet the definition of supervisor and are included in the unit as employees. *Meyer Supermarkets, Inc.*, 142 NLRB 513; *Indiana Refrigeration Lines, Inc.*, 157 NLRB 539. Accordingly, I find that *Olshewski* and *Taylor* should properly be included in the unit herein found appropriate.

With respect to the GLPN's, there remains for consideration the Employer's contention that the GLPN's should be excluded as professional employees. This contention was considered and rejected by the Board in *New Fern Restorium Co.*, 175 NLRB No. 142. As in *New Fern* the record testimony reveals here that the course of instruction may be as short as 12 months, after which the applicant for license may take a State prepared examination and, upon satisfactory completion, become a licensed GLPN. The record herein does not disclose that the Employer imposes any additional educational or training requirements upon its GLPN's beyond those required by statute. As in *New Fern* I conclude that the GLPN's requirements for licensing are not within the contemplation of Section 2(12) of the Act, and accordingly find that the GLPN's are not professional employees.

* * * [remainder of decision irrelevant]

strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by National Union of Hospital and Nursing Home Employees, Local 1199H, Retail, Wholesale & Department Store Union, AFL-CIO.

/s/ John C. Getreu
John C. Getreu
Regional Director, Region 9

[seal] Dated September 2, 1971
at Cincinnati, Ohio